16383

No. ~~16385~~ and No. 16401

United States Court of Appeals
For the Ninth Circuit

No. 16383

MORRISON-KNUDSEN COMPANY, INC., *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 16401

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 341, AFL-CIO, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION BY MORRISON-KNUDSEN COMPANY, INC., TO REVIEW DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND PETITION BY THE NATIONAL LABOR RELATIONS BOARD TO ENFORCE SAID ORDER AGAINST MORRISON-KNUDSEN COMPANY, INC.

REPLY BRIEF OF MORRISON-KNUDSEN COMPANY, INC., PETITIONER

ALLEN, DEGARMO & LEEDY
GERALD DEGARMO
SETH W. MORRISON
Attorneys for Petitioner.

1308 Northern Life Tower,
Seattle 1, Washington.

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1. RECENT DEVELOPMENTS

Since the preparation of this petitioner's initial brief, there have been two significant developments which have substantially disposed of the conflict between Board decisions and Court decisions as to the criteria of legality applicable to Union hiring halls, and these developments have further rendered moot

the policy considerations which had apparently motivated the Board in its efforts to prescribe the conditions of utilization of such hiring halls.

The first development was the decision of the above court in *N.L.R.B. v. Mountain Pacific Chapter of the Associated General Contractors, Inc.* (No. 15966, decided August 28, 1959). In that case the Board had held that the mere utilization of an exclusive hiring hall necessarily encouraged Union membership in an illegal manner, unless certain so-called safeguard provisions were contained in the contract under which the hall was operated. This contention we submit is substantially identical to the contention made in the present case that the mere practice of employees being dispatched through the Union having jurisdiction over their work, even if such employees are not hired from the Union hiring hall, necessarily encourages Union membership in an illegal manner.[1]

It has always been the employer's position that the utilization of a dispatch system as in the present case was not in itself illegal nor did it constitute illegal encouragement of union membership by discrimination. This Court in its opinion in the *Mountain Pacific* case clearly held that the mere utilization of an exclusive Union hiring hall could not be deemed *per se* illegal, nor could it even be used as *prima facie* evidence of an illegal hiring hall in retrospect.

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[1] In the General Counsel's Brief, the phrase "union membership and union clearance" is used in the conjunctive as a description of alleged illegal conduct over thirty-seven times. It has been the General Counsel's position that the requirement of union dispatch is the equivalent of the requirement of union membership.

By the same token in the present case, the mere practice of having employees dispatched through the Union hall, even though some employees are not originally hired from the hall, is not illegal. As reiterated in the *Mountain Pacific* case, the adoption of a system of Union referral or clearance does not in itself violate the act. Therefore, the continuous reference by General Counsel to the existence of a dispatch or clearance system in the Anchorage area between the Union and the employer in the present case is a reference to a practice which does not have legal significance. The reason the General Counsel contends that a system of Union dispatch or clearance is equivalent to requiring Union membership is that the system of dispatch is clearly established by the record, and in fact not denied by the parties, whereas there is no substantial evidence of a practice of discrimination because of membership or non-membership in a Union.

The second significant development is the adoption in the Labor-Management Reporting Act of 1959 of statutory recognition of the peculiar problems of the construction industry. The applicable portions of this Section are as follows:

> SEC. 705:
>
> "(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are

members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to Section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

By spelling out the permissible conditions which may be included in the utilization of a hiring hall, Congress has largely eliminated the speculation and uncertainty which had arisen in this area. There is no further necessity for the Board to attempt to impose its own criteria. It is significant, as will be later discussed in this brief, that under any view of the facts in the present case, they would not be in violation of the

present Act above quoted. Although this might not technically be a defense to a past violation, it certainly has a strong bearing on the appropriateness of the remedy.

II. EXCEPTIONS TO BOARD COUNTER-STATEMENT

Although this petitioner has already discussed in its initial brief many of the issues to which it now takes exception in the Board's brief, clarification of the issues and evidence requires a point by point analysis of the Board's Statement of the Case.

1. The Board points out (P. 3) that Raoul Wargny, an employee of only six months' duration with petitioner who was unvoluntarily discharged, discovered that the company had a general practice of requiring Union clearance as a condition of hire. However, the testimony referred to on Transcript Page 162 consists of a leading question by the Board Counsel merely to the effect that a general practice to clear through the Union was discovered, with no reference to such clearance being conditional. Furthermore, as previously discussed, a system of such clearance is not illegal. *N.L.R.B. v. Mountain Pacific, supra,* and cases therein cited.

2. Reference is next made (P. 3) to testimony that Wargny assumed that Union membership was a condition of dispatch, and Aner Erickson, Project Manager, assumed that Local 341 dispatches were Union members. The testimony of Mr. Wargny that he assumed that Union membership was a condition of dispatch (appearing on Page 155) is the *only* testimony in

the record directly relating, as a general practice, a requirement of Union membership to obtaining dispatch through the Union. Although it is urged in the brief and in the various orders that this testimony is "credited," it is obvious that such testimony cannot be substantial evidence because it is by its own admission not based on personal knowledge or any knowledge whatsoever. It is not even hearsay, but merely personal conjecture, speculation and assumption. Such testimony is not sufficient even to support a jury verdict, and falls far short of the substantial evidence test of Section 10(f) of the Act, 29 U.S.C.A. Section 160, *Universal Camera Corporation v. National Labor Relations Board* (1951) 340 U.S. 474, 95 L.ed. 456; *Controller of California v. Lockwood* (C.A. 9, 1951) 193 F.(2d) 169; *Moore v. Chesapeake & Ohio Railway Company,* 340 U.S. 573, 95 L.ed. 547.

3. The statement is next made (P. 3) that Wargny never hired non-Union employees (Tr. 161); the inference is that he either could not or would not hire non-Union employees. A reading of the entire testimony referred to shows that no such inference was intended or could be made:

> "Q. Did anybody, Mr. Wargny, that was over you in your job with M-K ever tell you that you couldn't hire nonunion people?
>
> A. No, sir. [52]
>
> Q. As a matter of fact, could you hire nonunion people? A. Yes, sir.
>
> Q. And as a matter of fact, did you ever hire nonunion people? A. No, sir.

Q. Did anybody from Local 341 ever, by either direct words or inference, threaten any repercussions if you hired nonunion people?

A. Not that I recall."

Mr. Wargny further testified as the Board's witness as follows:

"Q. (By Mr. Hartlieb): Mr. Wargny, while you were personnel manager for M-K, were you ever told or were you aware of any agreement between (sic.) M-K and the union to the effect that only union men would be hired and that the company would use the union hall as its sole source of recruitment for labor? A. No, sir.

Q. You knew of no such agreement, neither oral or tacit? A. No, sir."

Reference is made throughout the Board's brief to crediting Mr. Wargny's testimony, but it is not made clear which part of his frequently conflicting testimony is credited. Although emphasis is placed on Mr. Wargny's testimony that requested employees would be dispatched by the Union if they were available and in "good standing," the only testimony describing good standing refers to good standing with the company and not the Union (Tr. 146).

It is apparent that a practice of Union clearance or dispatch developed because the Union supplied the overwhelming majority of men to the various construction jobs. It is further apparent that Mr. Wargny was familiar with the Union dispatch system, but had no knowledge whatsoever as to whether Union membership in fact was a condition of dispatch. Although the hearings in this case lasted for a week in Anchorage alone,

and although the General Counsel called fifteen witnesses, he failed to produce one witness who had been denied a dispatch because he did not belong to the Union. Mr. Wargny further testified that no prospective employee ever appeared for employment who did not have a dispatch slip (Tr. 146).

4. An example of the Board's attempt to relate unrelated circumstances is contained in the bottom of Page 5 of the Board's brief. The contention is there made by the Board that on several occasions Local 341 refused to issue clearances and under such circumstances the company would radio that the man was not available because he wasn't a member of the Union. However, the witness stated there were not more than three cases in which the Union refused to send a man requested (without reference as to why), and the only case in which the witness did recall the reason, it involved a question of priority (Tr. 160). We submit that this vaguely recalled instance involving one employee cannot support a finding that Union membership was a condition of obtaining dispatch from the Union involved. Yet, based on not more than this testimony, the Board requests the above court to enforce an order requiring reimbursement of thousands of dollars in order to implement the Board policy which is already obsolete.

We believe the discussion of the above court in the case of *N.L.R.B. v. International Union of Operating Engineers, Local 12* (C.A. 9, 1956) 237 F.(2d) 670, at page 674, is particularly applicable to the present case.

"The record discloses as to the alleged discrimi-

natory operation of the dispatch system that although the system devised by the union for preference in referrals could conceivably admit of a discrimination against a nonunion workman, there was no evidence of a scheme or practice of discrimination by the union. The only instance of that kind shown was that of Holderby, and a single isolated incident of this type cannot support a cease and desist order. See *N.L.R.B. v. Amalgamated Meat Cutters,* 9 Cir., 202 F.(2d) 671.

"The Trial Examiner found adverse to the petitioner on this contention because of lack of evidence to support the claim. We think he was correct."

By the same token, the Trial Examiner in the present case, who had spent over a week in hearings on the case and was thoroughly familiar with it, concluded that although the event concerning the college students constituted what in effect was an isolated event of unlawful encouragement, there was simply no substantial evidence of a general practice or agreement of requiring Union membership as a condition of employment. There in fact was no single instance before him in which employment had ben refused because of nonmembership.

5. In footnote 8 on the bottom of page 10 of the Board's brief, it is argued at the end of the footnote that "the Board in substance affirmed the Trial Examiner's finding." The fact is of course that on the same record, the Board reversed the Trial Examiner and held that, by selecting certain portions of the testimony more fully discussed in this petitioner's Initial

Brief, a practice between the parties was established on the record as it stood. The Trial Examiner revised his original findings accordingly, again on the same record. Under that status of the case, the Trial Examiner had no choice but to conform his decision to the Board's opinion, which had reversed his earlier decision. Under no circumstances can the findings be called the Trial Examiner's findings, regardless of the insertion of the make weight and save face recitation of "Upon the entire record in the case, all of which has been carefully read, and parts of which have been reread and rechecked several times" (Tr. 58).

III. REPLY TO BOARD'S ARGUMENT ON FINDINGS

1. In Paragraph 1, the Board states that the petitioners do not deny that if they were parties to an arrangement and practice which made Union membership *and clearance* a condition of employment, they violated the Act. As we have previously discussed, because the record at most only supports a finding of a practice of Union clearance, the Board has attempted to equate Union membership and Union clearance as equivalent conditions and thereby make its case. If the Board did not consider the requirement of Union clearance an independent violation of the Act, there would be no necessity for even referring to it. To assert a violation of the Act, the Board need only say that the petitioners were parties to an arrangement which made Union membership a condition of employment.

Therefore, when, on pages 13 and 14 of its brief, the Board asserts that the issues involved in the *Mountain*

Pacific case are not involved in the present case, the Board is ignoring its own repeated reference to the Union clearance aspect of the case. A system of clearing all employees through the Union would be somewhat equivalent to, although lesser than, an exclusive hiring hall such as was involved in the *Mountain Pacific* case. In that case the Board contended the use of the hall, without safeguards, was illegal. In the present case, the Board contends that the dispatch system is illegal. The theory in both cases is that it gives the Union an opportunity to encourage membership by discrimination. The above court held that, consistent with the long line of cases cited therein, that these circumstances did not of themselves constitute an illegal practice. The court further held that if the Board desired to use such circumstances as evidence of an illegal practice, it could do so prospectively only. The issue in the *Mountain Pacific* case is almost identical to this issue in the present case.

2. Reference is further made on page 14 of the Board's brief to the existence of a "closed-shop arrangement." We understand the closed-shop to be a situation in which hires are only made from the Union, and the Union will permit only Union members to be hired. We understand a Union shop to be the situation wherein the persons can be hired anywhere, but must join the Union as a condition of continued employment. In view of the fact that not one of the fifteen persons who testified as employees in the present case was supplied by the Union, under no circumstances could it be argued that a closed-shop practice prevailed.

The closed-shop arrangement is illegal under any circumstances. The Union shop arrangement is legal if an appropriate contract is negotiated, under both the old law and the 1959 amendment. By its frequent use of the expression "closed-shop" the Board brief attempts to picture in a more serious light the nature of the charges being made in order to justify the punitive remedy which the Board has imposed.

3. On page 16, the Board in its brief makes the assertion: "and as the company knew, the Union issued dispatch slips only to members or applicants for membership (R. 61, 318, 155, 352, 160, 243)." As the Board deems this the key to their case, we believe it appropriate to analyze each of the citations made:

R. 61. This is a reference to the Trial Examiner's Supplemental Report containing the Board's directed finding which we are here reviewing. It hardly constitutes evidence in support of an assertion.

R. 318, William A. Wyman:

> "A. Well, that was before I filled out the application. I had asked him about the dispatch slip and he said, 'Well, we will get the dispatch slip for you as soon as we fill out the application.' And, he said, '*We would like for you to join* the union this summer since the halls are terrifically filled up and we are putting you people out on the job,' which was obviously in front of the fellows who were waiting, I should believe, and he said, '*We would like for you to join the union.*' I believe I said, 'Certainly. I came up here with the intention of joining the union.' "

If there ever was testimony inconsistent with an absolute requirement of Union membership as a condition of employment, it is this testimony. If in fact Union membership was a condition of employment, it is inconceivable that a business representative of a labor union would merely request a potential employee to join.

R. 155. This is the reference to Mr. Wargny's assumption that an employee had to join the Union to get a dispatch slip.

R. 352, Aner W. Ericksen:

> "Q. Is it a fact that you assume that all the people that 341 assigns you are members of Local 341? A. I believe that's correct."

It should be noted that this question by Government Counsel on cross-examination does not refer to all employees hired who might be dispatched through the Union but refers to those employees who are assigned to the employer by the Local. Mr. Erickson's assumption no more constitutes substantial evidence than does Mr. Wargny's assumption. Further, it is unclear whether Mr. Erickson is referring to the fact of general knowledge that practically all construction employees belong to their respective labor unions (*Webb Construction Company v. N.L.R.B.*, 196 F.(2d) 841) or whether he is referring to the likelihood that Union members would remain at the Union hall waiting for open calls.

160. This refers to Mr. Wargny's recollection of one

instance concerning the Union's desire to give priority to men who had been "on the bench" longer. We believe this was a legal position for the Union to take at the time, and it certainly is specifically authorized by the 1959 Amendment. It should further be noted that the language used was not "refuse" but "did not want." We believe this is typical of the effort to distort into illegal conduct what must have seemed to the Union agent to be a perfectly fair position to take. Equitable rotation of employment is certainly a permissible Union function.

R. 243. This refers to the testimony of Denton Moore, talking not to a company representative but to the *labor steward* as follows:

> " 'How does a white man get a job here?' He said, 'In order to get a job the *best thing you can do* is go to Anchorage, join the Laborers Union and request to be sent out to Site 2,' which was the Big Mountain site. And, 'Well,' I said, 'I can't afford to go to Anchorage, I am not fishing this year, I don't have any great amount of income,' and I said, 'Would a letter suffice?' and he said no, you should go in personally. He was trying to be helpful."

Here was a man attempting to promote his own organization and the benefits of Union membership. Even under these circumstances, the labor steward did not say "had to join" but merely said "the best thing you can do." Like the request to Mr. Wyman to join the Union, this conference with Mr. Moore is entirely inconsistent with what would have been said by a labor steward if Union membership was in fact a condition

of employment. The above court and counsel are capable of applying their own expertise in considering the inconsistency of this testimony with a closed shop agreement.

4. On the bottom of page 17 in footnote 12, the Board's brief makes the following comment: "The Company's expectation that such friction would develop shows that it was conscious that the Union and its members thought that the company owed them employment preference." The employment preference was being given to the college students, to which any Union might well object. The Board apparently does not concede that equitable rotation of employment is a proper Union function.

5. In footnote 14 on page 18 of the Board's brief, the Board attempts to explain away the conclusive testimony that all of the employees at Big Mountain were hired without joining the Union, although many subsequently did. In considering the importance of this fact, it must be remembered that this entire case arose out of the charge of Denton R. Moore, a resident of Big Mountain, that he and various other men at the Big Mountain site near Iliamna, Alaska, were refused employment by M-K because they were not members of Local 341 (Tr. 5 and 6). The charges arose not in Anchorage, but at Big Mountain. Yet the evidence is conclusive that these natives were hired as quickly and under such circumstances as was possible without regard to Union membership and many earned very substantial amounts of money (Respondent's Exhibit 5). It further appears that these local inhabitants

were hired at a time when a substantial number of persons were available for employment in Anchorage. If Union membership in fact was a condition of employment with M-K, Local 341 would certainly not have missed the opportunity of collecting initiation fees and dues from this large potential source of membership. Whether a hiring hall was maintained or not would make no difference whatsoever in requiring Union membership. A labor steward was on the site at all times. The fact that most skilled employees were obtained from Anchorage would make no difference nor would hiring by other company personnel. If in fact a practice of requiring Union membership as a condition of employment existed, it would have existed wherever the company and the Union operations extended.

What is established is that for the skilled laborer in Anchorage, Union membership was the universal rule and the Union hiring hall was his most effective means of obtaining employment information at the earliest time with a minimum of effort. Under these circumstances, it is quite possible for Mr. Wargny to assume that everyone was a Union member and had to be a Union member to be dispatched. On the other hand, in the field, Union membership was the exception rather than the rule, and the local employees normally did not join until after their employment. This is simply the result of the various economic and experience factors operating in the construction industry over the years. It does not constitute a conscious practice or arrangement.

6. It is noted on page 20 that the Board again contends that the Company requirement of dispatch slips is sufficient to establish that the Company violated the Act. The Board cites *Morrison-Knudsen, Inc., v. N.L.R.B.* (C.A. 9, No. 16301, decided August 10, 1959). This case had nothing whatsoever to do with dispatch slips, but rather involved, according to the Board's findings, the refusal of a business agent to permit the Kings River Constructors to employ a person because he was not a member of the business agents' local.

The Board's contention above paraphrased is directly contrary to this Court's decision in *Mountain Pacific, Swinerton* and other decisions therein cited that a dispatch system is not illegal itself, but only an event of discrimination in the administration of such a dispatch system is illegal. The Board contends that Mountain Pacific is not in issue in the present case, yet persists in asserting that a dispatch system itself constitutes a violation of the Act. As we have previously discussed, this reasoning so permeates the opinion as to compel the conclusion that the Board's decision is not based on a requirement of union membership but on the operation of a dispatch system.

7. On page 21, the assertion is made that the Union has never denied the existence of the arrangement as alleged by the Board. The fact is the Union has denied the allegations in their Answer to the Complaint and the existence of an arrangement or agreement was categorically denied by Mr. Erickson and even by Mr. Wargny. In view of the status of the proceedings at

that time, it would hardly warrant opening up the hearing at Anchorage, Alaska, just to deny that which had already been denied both in pleadings and by the parties who did testify. It must be remembered that at this time, the *Brown-Olds* blanket reimbursement order had not been imposed, or even contended for by the General Counsel. The Trial Examiner did not recommend blanket reimbursement or any reimbursement in his initial order. The Company had already acquiesced in the pertinent cease and desist order, and there appeared to be little reason to call all parties back to reopen a record which both counsel and the Trial Examiner originally felt was inadequate to support the finding of any violation, other than the incident of the college students.

IV. BROAD FORM OF ORDER

On page 26, the Board has cited a Third Circuit decision (*N.L.R. B. v. United Mine Workers of America,* District 2, 202 F.(2d) 177) apparently in support of a contention that the Board's broad power to determine the scope of its orders is sufficient to support any exercise of that power by reciting the magic words that "The unfair labor practices found . . . compel an inference that the commission of other unfair labor practices may be anticipated in the future" (Tr. 84). This precise issue is decided by the above court adversely to the Board in the case of *Morrison-Knudsen, et al., dba Kings River Constructors v. N.L.R.B.,* No. 16,301, decided August 10, 1959. Morrison-Knudsen was one of four joint venturers composing the Kings River Con-

structors. In that case the court held that there was no evidence indicating that petitioners had in the past been guilty of any unlawful conduct prohibited by the Board order *other than this practice.* "Other forms of encouragement of union membership and loyalty may not 'fairly be anticipated' from the mere existence of a practice of this sort."

There is no evidence in the present case nor is there any contention in the Board's Brief that M-K has committed any other type of unfair labor practice, and there is therefore no necessity for a cease and desist order referring to other types of violations.

We note with some interest that on page 30, the Board cites a case involving M-K presently on appeal to the Court of Appeals for the Second Circuit. It would seems that the Board should at least wait until the case has been finally determined.

V. BROWN-OLDS REIMBURSEMENT ORDER

1. On page 32, the Board asserts that the Petitioners rely on the national defense nature of the work being performed as a defense to an appropriate remedy. No such contention has been made. What M-K has attempted to explain is the importance of the utilization of the union hiring hall in effecting efficient dispatch of persons in the construction industry. This importance was so clearly recognized by Congress that in the remedial legislation of the 1959 Disclosure Act, the construction industry was selected for specific treatment permitting pre-hire agreements and the maintenance of hiring halls.

Notwithstanding this Congressional recognition of the importance of the hiring hall in the construction industry, the Board would still require the reimbursement of all dues and initiation fees for an unlimited period as the appropriate remedy for conduct which, even under the Board's view, would be entirely legal under the present Act. The Board is attempting to impose its most drastic penalty on a situation which Congress has attempted to alleviate.

2. On page 37, the Board contends that the company benefited by shifting to the union the burden of finding most of its skilled workers, and this benefit would warrant the reimbursement order entered. As appears from Mr. Wargny's testimony, the company on the White Alice project alone maintained a personnel manager and two assistants in the company hiring office. However, M-K is not the only contractor doing business in Alaska, and any employee desiring construction work would go to the union hall where all of the contractors call for personnel. Otherwise the employee would have to make the rounds of all of the various contractors. The Board's contentions illustrate the complete lack of understanding of the practical factors which make the union hiring hall the most efficient source of employment for the men involved.

3. On pages 34 and 35 of its brief, the Board cites, in support of its statement that Courts of Appeal have uniformly approved blanket reimbursement orders, a series of cases, none of which are in any manner similar to the case at hand.

In *Dixie Bedding Manufacturing Company v. N.L.R.B.,* 268 F.(2d) 901, the Board ordered the reimbursement to employees of dues *checked off* by the employer for the benefit of a minority union, a deliberate, executive action.

Local Lodge Number 1424 v. N.L.R.B., 264 F.(2d) 575, involved a minority union and a dues check off system. *N.L.R.B. v. Local 404,* 205 F.(2d) 99, involved reimbursement to certain named persons for whom there was testimony in the record. This was not a blanket reimbursement case.

N.L.R.B. v. Broderick Wood Products Company, 261 F.(2d) 548, involved an illegal union security contract, a dues check off under the contract and actual discharge of many employees under the contract.

N.L.R.B. v. General Drivers, etc., 264 F.(2d) 21, also involved a dues check off situation.

In every one of these cases, there was the element of responsible, deliberate action by the company and the union fully evidenced either by a written contract, an actual event of discrimination or specific evidence concerning particular employees.

4. On page 34, reference is made to the union's threats of discharge as impelling the employees to pay their fees and dues. An examination of the record to which citation is made reveals the single isolated instance of a minor labor steward, Steve Alukas, threatening one of the college students after he had been hired (Tr. 183-184). There is no showing that the em-

ployee ever asked the company about this threat or made any effort to have the matter clarified. It is very questionable that such an insignificant event would be binding even upon the union, much less the employer.

We submit that if there ever was a case in which the blind application of an obsolete policy by the Board resulted in an oppressive order not calculated to effectuate the policies of the Act, it is this case. *N.L.R.B. v. United Mine Workers* (1958) 355 U.S. 453, 2 L.ed. (2d) 401.

5. In considering the appropriateness of the Brown-Olds blanket reimbursement remedy, we note that the Board has failed to make any comment concerning M-K's contention on pages 29 to 33 of its initial brief that the discriminatory application of the blanket reimbursement order under the amnesty program constitutes an abuse of discretion. We submit that the Board failed to respond to this contention for the reason that there is no adequate response, particularly in view of M-K's own acquiescence in the original cease and desist order as framed in the first report by the Trial Examiner. Although M-K objected to the broad form of the order, and such objections have been uniformly supported by the courts, it nevertheless did not except to the imposition of the principal order, and this was done in February, 1958, prior to the June 1, 1958, date on which General Counsel, Jerome D. Fenton, requested that hiring arrangements be voluntarily conformed to the Act (Company Brief, page 31). This consent to the order was done not because of an admission that the Company had engaged in an illegal ar-

rangement, but simply as assurance that they would make every effort to in all respects comply with the Act and that even the isolated instance of the college students would be the basis for more careful control of supervisory practice.

VI. FAILURE TO TIMELY URGE ENTRY OF THE BLANKET REIMBURSEMENT ORDER

On page 39, footnote 30, the Board purports to answer the Company's contention that under the Board's own rules as well as the Act, the issue of blanket reimbursement was not timely presented. The Board now unequivocally contends that although the parties may be subject to the rule, the Board is not. In support of this contention the Board cites six cases, only one of which discuss the point involved.

In *N.L.R.B. v. Townsend,* 185 F.(2d) 378 (C.A. 9) the court refers to Section 10(c) (29 U.S.C.A. Sec. 160 (c)) which provides that the order of the Trial Examiner shall become the order of the Board, if no exceptions are filed. The court goes on to hold that under Section 10(d) the Board may modify or set aside an order previously made by it. This case merely deals with the finality of a Board order, and not the nature of the issues which can be considered. Furthermore, the case does not consider the impact of the Board's own self-imposed rule which prohibits any matter not included in the Statement of Exceptions from thereafter being urged before the Board. The prejudice of this arises from the fact that all parties had rested and the Trial Examiner had made his supplemental report,

which did not contain a recommendation for blanket reimbursement, before such contention was even raised by the General Counsel. The Board has not and cannot cite a case which will hold that a rule applicable to the parties proceeded against is not equally applicable to the Board, as represented through its General Counsel. The combination of the Board as prosecutor and judge is difficult enough without giving to it immunity from its own rules.

The cases have consistently held that individual parties who take no exception are precluded from contesting not only the substantive finding of the Board but also the validity of remedial orders. See *N.L.R.B. v. Bull Insular Lines, Inc.,* 233 F.(2d) 318; *N.L.R.B. v. Auburn Curtain Co., Inc.,* 193 F.(2d) 826; and *N.L.R.B. v. Holger Hansen,* 220 F.(2d) 733.

The Board itself has recognized that the correct disposition of such a case in which the General Counsel fails to except to the Trial Examiner's order is for the Board to adopt the order without passing on the merits. The findings are then not precedent in other cases. Colonial Fashions (1954) 110 N.L.R.B. 1197.

Respectfully submitted,

ALLEN, DEGARMO & LEEDY

By: GERALD DEGARMO

SETH W. MORRISON

Attorneys for Petitioner, Morrison-Knudsen, Inc.